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JUN 18 1940
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 161

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION.

No. 162

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Martin Engebretson, Trustee of the Estate of The Brictson Manufacturing Company, a corpora-

tion, bankrupt, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit, entered in the above causes on May 6, 1940, confirming judgments of the District Court of the United States for the District of South Dakota, Southern Division, dated April 17, 1939.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in .... F. (2) ...., and is found at page 211 of the record herein.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938, Sec. 1 (February 13, 1935). 28 U. S. C. A., Sec. 347.

SUMMARY STATEMENT OF MATTERS INVOLVED

The above causes were consolidated for trial by the District Court with separate findings of fact, conclusions of law and judgment. The judgment in each instance was against the trustee in bankruptcy, the petitioner here. Separate appeals were perfected with the record on appeal in the first case containing the evidence received on the trial of the consolidated actions. The cases were argued together in the Circuit Court of Appeals with one opinion by that court. We will designate the record in the first case as "R" and the record in the second case as "R_2."

The District Court of the United States, District Court of Nebraska, Omaha Division, hereinafter called Federal Court, appointed Ralph M. West of Omaha, Nebraska, hereinafter called West, receiver of all of the property of The Brictson

Manufacturing Company, a South Dakota corporation, hereinafter called corporation, on September 3, 1921, in an action wherein H. E. Close, *et al.*, were complainants, and The Brictson Manufacturing Company, was defendant, hereinafter called Close case (R. 24). West gave bond as receiver (R. 26, finding V, 61) and took possession of all of the corporate property (R. 62, finding VI). On appeal the order appointing West receiver was reversed upon the ground that there was no basis in pleading or fact for the appointment of a receiver and the District Court was ordered to require the receiver to return the property in his hands "to those from whom he received it" and that he be thereupon discharged (R. 123, 124; 280 F. 297). Before the property was returned the corporation was ousted as a foreign corporation from Nebraska in a *quo warranto* action in the State Court of Douglas County, Nebraska, hereinafter called State Court, in an action wherein State of Nebraska, *ex rel.* Ora S. Spillman, attorney general, was plaintiff, and The Brictson Manufacturing Company was defendant, hereinafter called *quo warranto* action, and John T. Marcell and others, hereinafter called Nebraska trustees, were appointed trustees for the corporation on February 16, 1924 (R. 154, 157). On appeal the judgment of ouster and appointment of the Nebraska trustees "to collect the debts due the corporation, pay the liabilities of the corporation and when properly ordered to pay the surplus, if any, to those entitled thereto as provided by Section 9298, Compiled Statutes of Nebraska for 1922" was affirmed (R. 159, 160). The *quo warranto* law of Nebraska will be found in the Appendix to this petition. On June 24, 1929, in the Close case, the Federal Court directed West to deliver the property of the corporation to the Nebraska trustees (R. 40, 42), but before he did so the corporation, on August 21, 1929, on a petition filed August

3, 1929, in the Federal Court of South Dakota, was adjudicated a bankrupt and petitioner is the trustee of the bankrupt estate (R. 61, finding III). West delivered the property to the Nebraska trustees September 7, 1929 (R. 62, 63, finding VII), who at all times since have exercised dominion and control over the same (R_2. 60, finding IX). On May 14, 1930, this petitioner as the trustee in bankruptcy advised the State Court that the corporation had been adjudicated a bankrupt and that he was trustee and petitioned that court to have the Nebraska trustees deliver to him the assets of the bankrupt estate which they held, but the court denied the relief (R. 170-173, R_2. 43, 44). Next, this petitioner as the trustee in bankruptcy, obtained an order from the bankruptcy court in a summary proceeding adjudging he had the title to the property of the bankrupt estate then held by the Nebraska trustees and that he was entitled to the possession thereof. On appeal this order was reversed and the bankruptcy court in *Marcell, et al., vs. Engebretson* (8 C. C. A.), 74 F. (2) 93, hereinafter called summary proceeding, was directed to dismiss the summary proceeding for want of jurisdiction. Next, this petitioner as the trustee in bankruptcy, commenced a plenary action in the Federal Court of Nebraska against the Nebraska trustees claiming he had title to the assets that West delivered to them and was entitled to the possession of the same. That action was dismissed on the ground that the court was without jurisdiction of the subject matter. On appeal in *Engebretson vs. Marcell, et al.* (8 C. C. A.), 84 F. (2) 315, hereinafter called plenary action, the dismissal was affirmed. The Federal Court in the Close case with actual notice that the corporation had been adjudicated a bankrupt and that no trustee had yet been appointed, made an order on November 27, 1929, purporting to release and discharge West

and exonerate his bond. The order will be found in the record at page 45 and the notice at page 115. The causes at bar result from a suit brought against West and the surety on his bond and a suit brought against the Nebraska trustees and the surety on their bond claiming that West breached his bond and the Nebraska trustees breached their bond when after supervening bankruptcy West delivered the assets of the bankrupt estate to and the Nebraska trustees took possession of the same and exercised dominion and control over the same. The cases at bar do not disturb the possession of the State Court. A suit to obtain possession of the bankrupt assets that West delivered to the Nebraska trustees would be unavailing as the District Court found most of such property has been dissipated (R_2. 62, finding XIV). The District Court in each instance rendered judgments against this petitioner as trustee in bankruptcy.

QUESTIONS PRESENTED

1.

Whether the judgment of the Circuit Court of Appeals, or its reasons therefor, or its *dictum* in connection therewith, reversing and ordering the bankruptcy court to dismiss *Marcell, et al., vs. Engebretson*, 74 F. (2) 93, for lack of summary jurisdiction; or the judgment of the Circuit Court of Appeals, or its reason therefor, or its *dictum* in connection therewith; affirming the judgment of the District Court dismissing *Engebretson vs. Marcell, et al.*, 84 F. (2) 315, for want of jurisdiction of the subject matter, determine any issue of merits in either case or that anything done in either case constituted *res judicata* of the issue whether West breached his bond as receiver; and whether the Nebraska trustees breached their bond as trustees when after supervening

bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same.

2.

Whether the judgment of the State Court in the *quo warranto* action and its orders and the *quo warranto* law of Nebraska, so far as the same provided for collecting the debts due the corporation, paying the liabilities and when properly ordered to pay the surplus, if any, to those entitled thereto, were superseded by the National Bankruptcy Act and the jurisdiction of the bankruptcy court.

3.

Whether with supervening bankruptcy whatever jurisdiction the Nebraska Federal Court had over the assets that West had received from the corporation and that were then in the actual possession of West came to an end, and such assets passed to the custody of the law in the bankruptcy court with West the mere repository for same subject to the jurisdiction of the bankruptcy court. Whether after supervening bankruptcy West could justify his delivering the assets of the bankrupt estate to the Nebraska trustees upon the ground that in doing so he obeyed the order of the court that appointed him.

4.

Whether the order of the State Court in the *quo warranto* action refusing to direct the Nebraska trustees to deliver the assets of the bankrupt estate to the trustee in bankruptcy constituted *res judicata* of the issue whether West breached his bond as receiver and whether the Nebraska

trustees breached their bond as trustee when after supervening bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same.

5.

Whether the Circuit Court of Appeals has misapplied the rule of this court in *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 75 L. Ed. 645, 51 S. Ct. 270, 272, and *Palmer vs. Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 S. Ct. 230, as to conflict between Federal and State Courts exercising a concurrent jurisdiction by applying it to the bankruptcy court exercising an exclusive paramount jurisdiction.

6.

Whether the holding of the Circuit Court of Appeals that *Marcell, et al., vs. Engebretson*, 74 F. (2) 93 (dismissed for lack of summary jurisdiction), and *Engebretson vs. Marcell, et al.*, 84 F. (2) 315 (dismissed for want of jurisdiction over the subject matter), constituted *res judicata* of the issue whether West breached his bond as receiver; and whether the Nebraska trustees breached their bond as trustees when after supervening bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same, gave an unwarranted effect to its judgments in these cases and by so doing deprived the trustee in bankruptcy of his property without due process of law contrary to the fifth amendment to the United States Constitution.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court of the United States for the District of South Dakota, appealed from in favor of Ralph M. West and The Aetna Casualty & Surety Company, a corporation, and against Martin Engebretson, trustee.

2. In affirming the judgment of the District Court of the United States for the District of South Dakota, appealed from in favor of John T. Marcell, Harry S. Byrne and Fidelity and Deposit Company of Maryland, a corporation, and against Martin Engebretson, trustee.

3. In holding that the Federal Court discharged West as receiver and released and exonerated his bond on November 27, 1929.

4. In holding that the order of the State Court, dated May 17, 1930, denying the application of the trustee in bankruptcy for possession of the assets of the bankrupt estate held by the Nebraska trustees constituted *res judicata* in the cases at bar.

5. In holding that the issue determined in the summary proceeding and the plenary action was the right of the State Court trustee to possession of the assets of the bankrupt as against the trustee in bankruptcy and that the court of bankruptcy was without jurisdiction to deal with such assets because the same were in the exclusive jurisdiction of the State Court which court had jurisdiction over such property and that the Nebraska state trustees had the right to administer such property.

6. In holding that West was an officer of the Federal

Court and could not have breached his bond by obeying the order of the court appointing him.

7. In holding that the judgment or reasons of the court or its *dictum* in the summary proceeding and also in the plenary action constituted *res judicata* of the issues in each of the cases at bar.

8. In failing to give effect to the National Bankruptcy Act and the exclusive paramount jurisdiction of the bankruptcy court.

9. In taking the property of this petitioner, trustee in bankruptcy, without due process of law contrary to the Fifth Amendment to the United States Constitution, by giving unwarranted effect to its judgments in the summary proceeding and in the plenary action and denying to this petitioner his day in court.

10. In failing to hold that with supervening bankruptcy whatever jurisdiction the State Court had over the assets of the bankrupt came to an end.

11. In failing to hold that with supervening bankruptcy the jurisdiction of the Federal Court and its unexecuted order directing West to deliver the property of the corporation to the Nebraska trustees, came to an end and any unexecuted orders of the Federal Court or any orders it made thereafter were without force or effect, so far as the trustee in bankruptcy or the bankrupt estate was concerned, and that the bankrupt assets were held by West as the mere repository for the bankruptcy court and subject to its jurisdiction.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

REASON I

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority as well as in conflict with the decisions of this Court. The Circuit Court of Appeals, in its opinion in this connection, holds:

> "In our view, it will not be necessary to go beyond the decisions of this court in *Marcell vs. Engebretson*, 74 F. 2d 93, and *Engebretson vs. Marcell*, 84 F. 2d 315 * * *. The issue which was determined was the right of the State Court trustees to possession of the assets of the bankrupt as against the trustee in bankruptcy. In *Marcell vs. Engebretson*, 74 F. 2d 93, it was necessary that this court determine the status of the property at the time of the filing of the petition in bankruptcy, and it was held that the constructive possession of that property was in the State Court and for that reason the court of bankruptcy was without jurisdiction to deal with it, it being in the exclusive jurisdiction of the State Court * * *. The disposition of these issues disposes of the questions presented by Plaintiff, for if possession was rightfully in the State Court trustees and the State Court had acquired jurisdiction of the assets long before bankruptcy, then the receiver delivered the assets to the right person and the Plaintiff was not entitled to them * * *. This court held that the Nebraska State Court had jurisdiction over the property and that the Nebraska State trustees had the right to administer it. Such a decision was evidence that Plaintiff was without right to receive the assets at the time West delivered them to the trustees" (R. 216, 217).

It is not clear from the above language whether the Circuit Court of Appeals considers its previous opinions referred to as constituting *res judicata*, or whether it considers its rea-

sons or *dictum* set forth in these opinions as good law and is following the same for that reason. If the court relies upon its former opinions above mentioned, we submit they do not constitute *res judicata* because the judgment of the Circuit Court of Appeals in each case did not and the court in each case was without jurisdiction to determine title, right to possession or which court should administer the assets of the bankrupt estate that West delivered to the Nebraska trustees.

In the summary proceeding the Circuit Court of Appeals found that the bankruptcy court was without jurisdiction to adjudicate title and it directed the District Court to dismiss the summary proceedings for lack of jurisdiction, 74 Fed. (2) 93, 99. In the summary proceeding the jurisdiction of the bankruptcy court was limited to whether the bankrupt had possession when the petition in bankruptcy was filed and if possession was lacking whether an adverse claim was asserted. *Thompson vs. Magnolia Petroleum Co.*, ...U. S...., ...L. Ed...., 60 S. Ct. 628, 630, note 4. *In re Harrison vs. Chamberlin*, 271 U. S. 191, 194, 70 L. Ed. 897, 46 S. Ct. 467, 468. Since the summary jurisdiction was lacking the bankruptcy court could not pass on the merits. In *Harrison vs. Chamberlin, supra,* this court said that where the bankruptcy court lacked summary jurisdiction it must decline to determine the merits. To the same effect is *Gamble vs. Daniel* (8 C. C. A.), 39 Fed. (2) 447, 453.

So far as the plenary action was concerned the Federal Court dismissed it for lack of jurisdiction over the subject matter. The subject matter was the title and right to possession of the property West had delivered to and the Nebraska trustees as officers of the State Court claimed. It is well settled that where a court dismisses an action for want of jurisdiction no question of merit can be passed upon.

Hughes vs. U. S., 4 Wall. 232, 233, 18 L. Ed. 303, 305. *McGilvra vs. Ross*, 215 U. S. 70, 80, 54 L. Ed. 94, 101, 30 S. Ct. 27, 31. *Shawnee Sewerage & Drainage Company vs. Frank P. Stearns*, 220 U. S. 462, 472, 55 L. Ed. 544, 547, 31 S. Ct. 452, 456. *In re National Labor Relations Board*, 304 U. S. 486, 494, 82 L. Ed. 1482, 58 S. Ct. 1001, 1005. In *U. S. vs. Corrick*, 298 U. S. 435, 440, 80 L. Ed. 263, 56 S. Ct. 829, 832, this court said as to the jurisdiction on appeal: "While the district court lacked jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit."

If the reasons or *dictum* of the Circuit Court of Appeals, in its two former opinions, are relied upon, the same does not constitute *res judicata*. In *Deposit Bank of Frankfort vs. Board of Councilmen*, 191 U. S. 499, 510, 48 L. Ed. 276, 280, 24 S. Ct. 154, 158, this court held that a judgment not the court's reason is necessary to constitute *res judicata*. That *dictum* does not constitute *res judicata* is well established. *Cohens vs. Virginia*, 6 Wheaton 264, 399, 5 L. Ed. 257. If the court's *dictum* holds as claimed by the Circuit Court of Appeals, we submit that it is not good law and should not be followed. The law in that connection we will discuss in connection with Reason II. If on an appeal, on the question of summary jurisdiction, the appellate court may pass on the merits, an adverse claimant no longer is entitled to a plenary action because by appealing an adjudication can be had in the appellate court.

REASON II

The Circuit Court of Appeals has failed to give effect to the National Bankruptcy Act, the exclusive paramount jurisdiction of the bankruptcy court and the applicable decisions of this court so far as the effect of supervening bankruptcy may be concerned on the *quo warranto* law of Nebraska, the jurisdiction of the State Court, the Nebraska trustees as trustees and on the conditions on the bond of the Nebraska trustees to collect the debts due the corporation and pay the liabilities. The Circuit Court of Appeals holds that the bankruptcy court was without jurisdiction to deal with the assets of the bankrupt estate that West delivered to the Nebraska trustees, it being in the exclusive jurisdiction of the State Court and that the State Court had the right to administer such assets (R. 217). That is, that the State Court will collect the debts due the corporation, pay the liabilities, etc. That is, the corporation's property was taken by the Nebraska state law to be distributed by the Nebraska State Court to creditors. The duties of the Nebraska trustees made them liquidating or winding-up officers of the State Court.

The *quo warranto* law of Nebraska and the judgment and orders of the State Court in so far as the same provided for collecting the corporate debts, paying the liabilities and winding up the affairs of the corporation were superseded by the exclusive paramount jurisdiction of the bankruptcy court and the National Bankruptcy Act. *In re Klein,* Fed. Cas. 7865, 1 How. 277, 11 L. Ed. 132, holds that any state law that distributes the property of the debtor among creditors conflicts with the National Bankruptcy Act. This case is cited with approval in *Hanover National Bank vs. Moyses,* 186 U. S. 181, 46 L. Ed. 1113, 22 S. Ct. 857, and

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 588, 79 L. Ed. 1593, 55 S. Ct. 854, 862, note 18. Neither the legislature nor the courts of a state can take action which restricts the scope of the National Bankruptcy Act. *Kalb, et ux., vs. Feuerstein, et ux.*, 308 U. S. 433, 84 L. Ed. 280, 260 S. Ct. 343. *Hammond vs. Lyon Realty Co., et al.* (4 C. C. A.), 59 F. (2) 592, 594. *International Shoe Co. vs. Pinkus, et al.*, 278 U. S. 261, 267, 73 L. Ed. 318, 49 S. Ct. 108, 110. Our examination of this court's decisions has failed to disclose a single case in which a state law that took the debtor's property and distributed it to creditors has been sustained. This court has sustained state laws where the substantive right under an assignment for benefit of creditors depended upon contract and the legislation merely governed the execution of the trust on which the property was conveyed. *Pobresle vs. Boyd*, 287 U. S. 518, 526, 77 L. Ed. 469, 53 S. Ct. 262, 264. The distinction between a state law that divests a debtor of his property for the purpose of compulsory distribution among his creditors and a state law that merely implements the debtor's inherent capacity to divest himself of that property by the voluntary exercise of his natural power to contract concerning his own property was recognized at an early time. *Hitchcock vs. Sedgewick* (1690), 2 Vernon's Reports 155. This principle is discussed in *Cook vs. Rogers*, 31 Mich. 391, 398. In *Straton vs. New*, 283 U. S. 318, 330, 75 L. Ed. 1060, 51 S. Ct. 465, 470, note 13, this court cites cases where the functions of the court's officers were that of winding up which conflicted with the National Bankrupcty Act. In *First National Bank vs. Robinson, et al.* (10 C. C. A.), 107 F. (2) 50, 53, a New Mexico law providing for the dissolution of a domestic corporation unless reorganized was held to be superseded by the National Bankruptcy Act. The ousting of the corporation from its fran-

chise was no part of the liquidation. *Chicago T. & T. Co. vs. Forty-One Thirty-Six W. Bldg. Corp.*, 302 U. S. 120, 126, 82 L. Ed. 147, 58 S. Ct. 125, 128. While the Nebraska Supreme Court in its opinion in 207 N. W. 664, 665, construed the *quo warranto* law as authorizing the Nebraska trustees "to pay the liabilities thereof that may be due to citizens or residents of this state," its mandate (R. 160) contains no such limitation. If the statute is subject to this limitation it would be unconstitutional. *Blake vs. McClung*, 172 U. S. 239, 43 L. Ed. 432, 19 S. Ct. 165. A state law providing for the taking of part of the debtor's assets for the payment of a portion of his creditors would not prevent it from conflicting with the National Bankruptcy Law. *In re Salmon* (D. C.), 143 F. 395, cited in *Straton vs. New*, *supra*, note 13, involved the distribution of the assets of a private state bank among bank creditors and the state law was held to conflict with the National Bankruptcy Act. The lapse of time does not save the jurisdiction of a court acting under a law superseded by the National Bankruptcy Act. *In re Weedman Stave Co.* (D. C.), 199 F. 948, cited in *Straton vs. New*, *supra*, note 13, the receiver in the State Court was in actual possession for more than four months before bankruptcy. The same was true in *Cresson & Clearfield Coal & Coke Co. vs. Staffer* (3 C. C. A.), 148 F. 981, and in *In re American & British Mfg. Corporation* (1 C. C. A.), 300 F. 839. If the Nebraska trustees be considered equity receivers they would still have to yield to the trustee in bankruptcy. *Duparquet Hont & Monense Co. vs. Evans*, 297 U. S. 216, 222, 80 L. Ed. 413, 56 S. Ct. 412, 415.

We submit that at the time West delivered the property to the Nebraska trustees that property belonged to the trustee in bankruptcy, was in the custody of the law in the bankruptcy court with West the mere repository of the same sub-

ject to the jurisdiction of the bankruptcy court and that whatever jurisdiction, if any, the State Court ever had over such property that the same came to an end with supervening bankruptcy. *Gross vs. Irving Trust Company,* 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605. *Taylor vs. Sternberg,* 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260. *Kalb vs. Feuerstein, supra.* The bankruptcy law was impliedly read into the bond of the Nebraska trustees and after supervening bankruptcy the Nebraska trustees' bond became subject to the conditions of the National Bankruptcy Law. *Wright vs. Union Central Life Ins. Co.,* 304 U. S. 502, 516, 86 L. Ed. 1490, 58 S. Ct. 1025, 1033.

REASON III

The Circuit Court of Appeals failed to give effect to the National Bankruptcy Law, the exclusive paramount jurisdiction of the bankruptcy court and the applicable decisions of this court; so far as the effect may be concerned of supervening bankruptcy on the jurisdiction of the Federal Court, on West as receiver and on the condition of the bond of West as receiver. The Circuit Court of Appeals holds: that the trustee in bankruptcy could not receive the assets of the bankrupt estate from West at the time he delivered the assets to the Nebraska trustees (R. 217); that West was an officer of the United States District Court of Nebraska and the condition of his bond was that he should obey the orders of that court in relation to his trust and that he could not breach his bond by obeying the order of the court appointing him (R. 219); and, that the Federal Court after actual notice of the corporation having been adjudicated a bankrupt made an order releasing and discharging West as receiver and exonerating his bond (R. 214).

We submit that with supervening bankruptcy the jurisdiction of the Federal Court came to an end. *Taylor vs. Sternberg, supra; Kalb vs. Feuerstein, supra.* So far as West was concerned after supervening bankruptcy he was the mere repository of property, the title to which had passed to the trustee in bankruptcy, with the property in the custody of the law in the bankruptcy court and West subject to the jurisdiction of the bankruptcy court. *Taylor vs. Sternberg, supra.* The bankruptcy law was impliedly written into West's bond as receiver. *Wright vs. Union Central Life Ins. Co.,* 304 U. S. 502, 516, 86 L. Ed. 1490, 58 S. Ct. 1025, 1033. After supervening bankruptcy the condition of West's bond required him to obey not the orders of the Federal Court but the bankruptcy court. After supervening bankruptcy not only was the order of the Federal Court directing West to deliver the property of the corporation to the Nebraska trustees without further force or effect, but the title to that property had passed to the trustee in bankruptcy and the property that West delivered to, and the Nebraska trustees received, was no longer the property of the corporation but the property of the trustee in bankruptcy. After supervening bankruptcy it was beyond the jurisdiction of the Federal Court to release and discharge West or exonerate his bond. *Taylor vs. Sternberg, supra,* and cases cited therein.

REASON IV

The holding of the Circuit Court of Appeals, that the State Court's order denying the application of the trustee in bankruptcy for possession of the property of the estate of the bankrupt constituted *res judicata* of the issue whether West breached his bond as receiver by delivering the assets of the bankrupt estate to the bankruptcy trustees conflicts with the following cases among others: *In re Diamond's Estate* (6 C. C. A.), 259 F. 70, 73, 75; *In re Watts & Sachs*, 190 U. S. 1, 27, 47 L. Ed. 933, 941, 23 S. Ct. 718, 724; *Gross vs. Irving Trust Co.*, 289 U. S. 342, 345, 77 L. Ed. 1243, 53 S. Ct. 605, 606, 607, 90 A. L. R. 1215. These cases hold that with due regard for comity a trustee in bankruptcy should apply to the non-bankruptcy court having possession of the assets of the bankrupt estate, calling its attention to the supervening bankruptcy and asking for possession of such assets and that such court's refusal to surrender possession did not constitute *res judicata.*

REASON V

The Circuit Court of Appeals has misapplied this court's holdings in *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738, 75 L. Ed. 645, 51 S. Ct. 270, 272, and in *Palmer vs. State of Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 S. Ct. 230. In *Isaacs vs. Hobbs Tie & Timber Co., supra*, by virtue of the exclusive paramount jurisdiction of the bankruptcy court, the real estate in Arkansas, part of the bankrupt estate was brought into the possession of that court in Texas. The property being in the possession of the bankruptcy court it exercised its concurrent jurisdiction relative to the mortgage lien to the exclusion of other courts the same as a court of

concurrent jurisdiction would do. The Circuit Court of Appeals in applying the rule in the Isaacs case holds that the State Court exercising a jurisdiction to take possession of the corporate assets, "collect the debts due the corporation and pay the liabilities, etc." was an exclusive jurisdiction which prevented the bankruptcy court from exercising its exclusive paramount jurisdiction as to the property belonging to the estate of the bankrupt and in the actual possession of West at the time that bankruptcy supervened. In other words, the State Court taking the property of the corporation by virtue of the state law to distribute it to creditors is exercising an exclusive jurisdiction, and since it is claimed to have first obtained constructive possession, it is to exercise its jurisdiction without interference from the bankruptcy court. This holding conflicts with numerous decisions of the Circuit Courts of Appeal and the applicable decisions of this court. In *In re Watts & Sachs*, 190 U. S. 1, 27, 47 L. Ed. 933, 941, 23 S. Ct. 718, 724, this court said: "But that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent." In *Gross vs. Irving Trust Co.*, 289 U. S. 342, 344, 77 L. Ed. 1243, 53 S. Ct. 605, this court holds that the rule between courts of concurrent jurisdiction does not apply to a bankruptcy court exercising a paramount jurisdiction.

In *Palmer vs. Texas, supra*, both the State Court and the Federal Court were exercising a concurrent jurisdiction and since the State Court was held to have first obtained jurisdiction the Federal Court was required to relinquish its jurisdiction. No question of the exercise of the exclusive paramount jurisdiction of a bankruptcy court was involved in that case. We submit that neither of the above mentioned cases sustains the holding of the Circuit Court of Appeals.

REASON VI

The holding of the Circuit Court of Appeals that *Marcell, et al., vs. Engebretson,* 74 Fed. (2) 93, and *Engebretson vs. Marcell, et al.,* 84 Fed. (2) 315, constituted *res judicata* of the issue whether West breached his bond as receiver when he turned the assets that he had received from the corporation to the Nebraska trustees gave an unwarranted effect to its judgment in these cases and by so doing has deprived the trustee in bankruptcy of his property without due process of law contrary to the Fifth Amendment to the United States Constitution. *Fayerweather vs. Ritch,* 195 U. S. 276, 297, 298, 49 L. Ed. 193, 25 S. Ct. 58, 63, 64. The trustee in bankruptcy has been denied his day in court because in the summary proceeding and in the plenary action he was denied relief because in each instance the court was without jurisdiction. In the cases at bar he is again denied relief because it is now claimed that his rights were determined in the summary proceeding and in the plenary action.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Article VIII of 1922 Statutes.

Quo Warranto.

Sec. 9280. Against whom filed. An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law.

Sec. 9281. Information, electors may file. Such information may be filed by the attorney general or by the county attorney of the proper county whenever either of such officers deem it his duty so to do, except that the county attorney shall not have authority to file such information against any state officer or a judge of the district court. Provided, however, that any elector of the proper county may file such information against any person unlawfully holding or exercising the functions of any public office in the state, other than state officers or judges of the district court, whenever the county attorney of the proper county shall refuse so to do within ten days after he shall have been notified in writing by any elector that any such person is disqualified by the constitution or the laws of the State of Nebraska to hold the office in question or to exercise the functions thereof. Any person other than the county attorney who shall institute such action shall file with such

information in the office of the clerk of the district court a bond signed by a duly authorized surety company or by two resident freeholders of the county in which said action is filed, the amount of which bond shall be not less than five hundred dollars and be fixed by, and the sufficiency of the sureties thereon approved by the said clerk. Said bond shall be conditioned that the plaintiff shall prosecute such action without delay and that he shall pay the costs of such suit including a reasonable attorney fee to the person against whom such information is filed should said action be unsuccessful. The amount of such attorney fee to be fixed by the court and taxed as costs in said action.

Sec. 9282. Attorney general or county attorney to file. The attorney general or the county attorney of the proper county must file such information when directed to do so by the governor, the legislative assembly, or the district court.

Sec. 9283. Contents of information. Such information shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court, which shall stand for an original petition.

Sec. 9284. Same—summons. Such statement shall be filed in the clerk's office, and summons issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court.

Sec. 9285. Answer. The defendant shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner.

Sec. 9286. Rights of claimant. When the defendant is holding an office to which another is claiming the right, the

information should set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties.

Sec. 9287. Judgment in his favor. If judgment be rendered in favor of such claimant, he shall proceed to exercise the functions of the office, after he has qualified as required by law.

Sec. 9288. Delivery of books and papers. The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office.

Sec. 9289. Suit for damages. When the judgment has been rendered in favor of the claimant, he may at any time within one year thereafter, bring suit against the defendant and recover the damages he has sustained by reason of the act of the defendant.

Sec. 9290. Several claimants. When several persons claim to be entitled to the same office or franchise, an information may be filed against all or any portion thereof, in order to try their respective rights thereto.

Sec. 9291. Ouster. If the defendant be found guilty of unlawfully holding or exercising any office, franchise or privilege, or if a corporation be found to have violated the law by which it holds its existence, or in any other manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceeding.

Sec. 9292. Judgment in other cases. If the defendant be

found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges.

Sec. 9293. Title of cause—costs. When an information is upon the relation of a private individual, it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs in case they are not adjudged against the defendant. In other cases the title of the cause shall be the same as in a criminal prosecution, and the payment of costs shall be regulated by the same rule.

Sec. 9294. Pretended corporation—costs. In case judgment is rendered against a pretended, but not real, corporation, the costs may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.

Sec. 9295. Dissolved corporations—trustees. If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders.

Sec. 9296. Same—bonds. Such trustees shall enter into bond, in such a penalty and with such security as the court may approve, conditioned for the faithful discharge of their trust.

Sec. 9297. Suit on bond—by whom brought. Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties.

Sec. 9298. Trustees—duties. The trustees shall proceed

immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.

Sec. 9299. Books, etc., of corporation. The court shall, upon an application for that purpose, order any officer of such corporation, or any other person having possession of any of the effects, books, or papers of the corporation in anywise necessary for the settlement of its affairs, to deliver up the same to the trustees.

Sec. 9300. Trustees—inventory. As soon as practicable, after their appointment, the trustees shall make and file in the office of the clerk of the court, an inventory of all the effects, rights and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to.

Sec. 9301. Act same as executors. They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders, respectively, to the extent of the effects which come to their hands in the same manner as though they were the executors of a deceased person.

Sec. 9302. Officers liable jointly and severally. When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby.

Sec. 9303. Contempt of court—penalty. Any person who, without good reason, refuses to obey any order of the court as herein provided, shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding five thousand dollars, and imprisoned in the county jail until he comply with said order, and shall be further liable for the

damages resulting to any person on account of his refusal to obey such order.

Sec. 9304. Letters patent—information of annulment. A proceeding of this kind may be instituted in the manner above contemplated, for the purpose of annulling or vacating any letters patent granted by the proper authorities of this state, where there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.

Sec. 9305. Information by private persons. When any citizen of this state shall claim any office which is usurped, invaded or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a *quo warranto,* upon his own relation, and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment: Provided, he shall have first applied to the prosecuting attorney to file the information, and the prosecuting attorney shall have refused or neglected to file the same.

Sec. 9306. Neglect of duty forfeits office. Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom.

Sec. 9307. *Quo warranto* against negligent officer. The

attorney general of the state, when directed by the governor, shall institute and prosecute *quo warranto* proceedings in the supreme court against any such county attorney or prosecuting officer, sheriff, police judge, police officer, or police commissioner, mayor or other officer, and if the court shall find that such officer has wilfully failed or refused to enforce any law which it is his duty as such officer to enforce, then the court shall render judgment of ouster against such officer and the office shall thereby become vacant.

Office - Supreme Court, U. S.
FILED
SEP 9 1940
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

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vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION.

No. 162

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vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents have failed to refer to any principle of bankruptcy law, but have referred to principles of general law, as though they applied to the cases at bar. Petitioner hopes this reply brief may be of aid to the court.

RESPONDENTS' POINTS I AND III

RESPONDENTS BASE THEIR POINTS I AND III ON THE LANGUAGE OF THE CIRCUIT COURT OF APPEALS IN THE TWO CASES AT BAR (R. 216, 217) SUBSTANTIALLY AS FOLLOWS: THE CONSTRUCTIVE POSSESSION OF THE PROPERTY WAS IN THE STATE COURT AND FOR THAT REASON THE COURT OF BANKRUPTCY WAS WITHOUT JURISDICTION TO DEAL WITH IT, IT BEING IN THE EXCLUSIVE JURISDICTION OF THE STATE COURT, AND THE NEBRASKA TRUSTEES HAD THE RIGHT TO ADMINISTER IT.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO GIVE EFFECT TO THE PARAMOUNT CHARACTER OF THE BANKRUPTCY LAW, AND THE REM, SUPERIOR AND EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT.

THE CIRCUIT COURT OF APPEALS HAS CONFUSED THE BANKRUPTCY COURT'S CONCURRENT, OR SUMMARY JURISDICTION, TO DETERMINE QUESTIONS AS TO TITLE OF OR RIGHTS AND INTERESTS OF THE BANKRUPT IN SPECIFIC PORTIONS OF HIS ESTATE, THAT IS TO MAKE SUCH PORTIONS OF THE ESTATE AVAILABLE FOR LIQUIDATION AND ADMINISTRATION, WITH THE BANKRUPTCY COURT'S EXCLUSIVE JURISDICTION TO LIQUIDATE AND ADMINISTER THE ASSETS OF THE BANKRUPT'S ESTATE.

We believe that the following analysis of the Bankruptcy Law will show these things.

Paramount Character of Bankruptcy Law.

The liquidation of the assets of the bankrupt corporation was no more a part of the forfeiting of the right of the corporation to do business, as a foreign corporation, than the liquidation of the assets of a domestic corporation is a part of the forfeiting of the charter of such corporation. It is well settled that the liquidation of the assets of a domestic corporation is no part of the forfeiting of its charter. *Chicago T. & T. Co. vs. Forty-One Thirty-Six W. Bldg.*, 302 U. S. 120, 126, 82 L. Ed. 147, 58 S. Ct. 125, 128. "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations." *Int. Shoe Co. vs. Pinkus*, 278 U. S. 261, 265, 73 L. Ed. 318, 49 S. Ct. 108. By virtue of the paramount character of the National Bankruptcy Act, whatever jurisdiction, if any, that the state court had over the assets of the bankrupt was superseded by supervening bankruptcy.

Rem Jurisdiction.

A bankruptcy proceeding is *in rem*. *Acme Harvester Co. vs. Beekman Lumber Co.*, 222 U. S. 300, 307, 56 L. Ed. 408, 32 S. Ct. 96. *Nature of Action in Rem.* An action *in rem* is always based on a statute because equity jurisdiction is exercised only *in personam*. *Hart vs. Sansom*, 110 U. S. 151, 154, 28 L. Ed. 101, 3 S. Ct. 586. A judgment *in rem* is conclusive with respect to the thing itself and operates as an absolute change of property. *Bingham vs. Fairweather*, 5 N. E. 265, 266. Jurisdiction *in rem* is acquired by seizure of the *res*. *The Brig Ann*, 9 Cranch. 289, 291, 3 L. Ed. 734. *U. S. vs. Mack*, 295 U. S. 480, 484, 79 L. Ed. 1559, 55 S. Ct. 813. Congress has the power to provide how seizure shall

be made under a federal law. *Miller vs. U. S.*, 11 Wall. 268, 296, 20 L. Ed. 135. Actual notice of a *rem* action is unnecessary. Seizure is sufficient notice. *Tyler vs. Judges* (Mass.), 55 N. E. 812. In *Kalb vs. Feuerstein*, 308 U. S. 433, 84 L. Ed. 280, 60 S. Ct. 343, the jurisdiction of the state court was superseded, although no notice was given to that court. Filing of notice of *lis pendens* is unnecessary. 38 *C. J.* 33. *Seizure in Bankruptcy.* "The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the time of the filing of the petition." *Acme Harvester Co. vs. Beekman Lumber Co., supra.* "The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all of the world." *Gratiot County State Bank vs. Johnson*, 249 U. S. 246, 63 L. Ed. 587, 39 S. Ct. 263. To the same effect is *Meek vs. Centre County Banking Co.*, 268 U. S. 426, 429, 69 L. Ed. 1028, 45 S. Ct. 560, and *Straton vs. New*, 283 U. S. 318, 321, 75 L. Ed. 1060, 51 S. Ct. 465. The estate of the bankrupt consists of all property, rights, titles and interests that the trustee in bankruptcy may make available to pay the expense of administration and debts. The *rem* jurisdiction of the bankruptcy court passed the title of the estate of the bankrupt to the trustee. The title passed *eo instanti. Carpo vs. Kelly*, 16 Wall. 610, 629, 21 L. Ed. 430. Since the date of the filing of the petition is the date of the line of cleavage, the title to the estate passes regardless of where located or how held.

Superior Jurisdiction.

Superior Jurisdiction. The superior jurisdiction of the bankruptcy court makes effective the seizure of the estate of the bankrupt regardless of how held. *Gross vs. Irving Trust Co.*, 289 U. S. 342, 344, 77 L. Ed. 1243, 53 S. Ct. 605. *Actual Reach.* That portion of the estate in the possession of the bankrupt actually or constructively, at the time of the filing of the petition, comes within the actual reach of the bankruptcy court. The balance of the estate comes within the court's constructive reach. One reach is as effective as the other.

> "While in ordinary equitable proceedings being *in personam* the actual seizure of property by one court may take precedence over the constructive seizure of another, nevertheless bankruptcy proceedings are *in rem* and the filing of the petition is constructive seizure and equal to actual seizure as far as cutting off all other jurisdictions."
>
> 1 *Clark, "The Law of Receivers,"* 1st Ed., Sec. 330, p. 407.

"The filing of the petition in bankruptcy is not the commencement of a suit against the failing debtor to recover debts due. It contemplates rather the collection and distribution of an estate. (*In re Henderson,* 9 Fed. 196, 197. *In re Hicks,* 107 Fed. 910, 911.) The very property sought to be reached has been by virtue of Acts of Congress brought *sub modo* under Federal influence and control by the filing of the involuntary petition which, so to speak, imposes a status on all of the property of the alleged bankrupt everywhere. (*In re Benedict,* 140 Fed. 55, 59. *In re Watts,* 190 U. S. 1, 28, 47 L. Ed. 933, 941, 23 S. Ct. 718, ...) At the date of the petition in Bankruptcy the creditors acquire a right *in rem* against the assets (*Sexton vs. Dreyfus,* 219 U. S.

339, 345, 55 L. Ed. 244, 245, 31 S. Ct. 256, 257)."

2 *Clark, "The Law of Receivers,"* 1st Ed., Sec. 337, p. 437.

The insertion of the citations in the above quotation is ours. The author cited the same in a footnote.

Bankruptcy and Attachment and Injunction. The filing of the petition in bankruptcy is a caveat to all the world, and, in effect, an attachment and injunction. *Int. Bank vs. Sherman,* 101 U. S. 403, 406, 25 L. Ed. 866. "Attachment" is used in the broad sense indicating a seizure of such rights, titles and interests as may be made available for the payment of the claims of creditors, for the purpose of bringing the same within the custody of the court. *In re Safady Bros.* (D. C.), 228 Fed. 538, 541. The filing of a petition in bankruptcy amounts to an injunction, because it is a notorious judicial act of which all are obliged to take notice. One of the earliest cases in this connection is *Hitchcock vs. Sedgewick* (1690), 2 Vernon's Reports 155, cited in *Collet vs. De Gols & Ward* (1734), Talbot's Case 65. These two cases are cited with approval in *Mays vs. Manufacturers National Bank,* 64 Pa. St. 74, 77, 3 Am. Rep. 573. The following cases are to the same effect: *Wickersham vs. Nicholson* (Pa.), 14 S. & R. 118, 119; *Howard vs. Crompton,* 14 Blatchford 328, Fed. Cas. 6758; *So. Ry. Co. vs. Cole* (Ga.), 176 S. E. 512; *Stevens vs. Mech. Savings Bank,* 101 Mass. 109; *Duffield vs. Horton,* 73 N. Y. 218; *Edison Elec. Ill. Co. vs. Tibbets* (1 C. C. A.), 241 Fed. 468, and *State Bank of Chicago vs. Cox* (7 C. C. A.), 143 Fed. 91, 93.

> "The assignment in bankruptcy made in one District, so far as its operation is a matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the debtor wherever it is situated so as to preserve it, according to the provisions

of the act, for distribution under it, and so the title shall pass, as it required, without regard to any dealings with it, which it forbids. WHATEVER HARDSHIPS, IF ANY, MAY FOLLOW TO PRIVATE PERSONS WHO SELL OR BUY IT, AND ATTEMPT TO DIVERT IT TO THEIR OWN USE, FALLS UPON THEM, AS IN OTHER CASES, WHERE TITLES FAIL, EVEN IN THE HANDS OF INNOCENT, BECAUSE IGNORANT PURCHASERS."

Connor vs. Long, 104 U. S. 228, 240, 26 L. Ed. 723.

Constructive Reach. That portion of the estate of the bankrupt, not in the possession of the bankrupt actually or constructively, when the petition is filed, may be brought within the court's actual reach, by resorting to the jurisdiction of a state or federal court, as the case may be.

"The filing of the petition in the case at bar was a command to all the persons having possession of the property which the bankrupt at that moment owned to hold the same subject to the order of the court, and the trustee can proceed in either a State Court or a Federal Court to secure actual possession of the assets of the Bankrupt estate."

Engebretson vs. West, et al. (Neb.), 277 N. W. 433, 436.

This petitioner was plaintiff; West and the Nebraska trustees were the defendants in *Engebretson vs. West, et al., supra.* That action involved the same property involved in the cases at bar, but did not include the sureties on the bonds of West and the Nebraska trustees which the cases at bar does.

"The Circuit and District Courts have concurrent jurisdiction of 'all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bank-

rupt transferable to or vested in such assignee'; R. S., sec. 4979; but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in aid of such a proceeding, but while progressing, are entirely separate from and independent of it. They are used by the Bankruptcy Courts to settle the rights of parties who are not subject to its jurisdiction in the suit in bankruptcy, and, who, therefore, cannot be affected by any judgment or decree that may be made in that case."

Wiswall vs. Campbell, 93 U. S. 347, 348, 23 L. Ed. 923.

Where a trustee in bankruptcy is entitled to resort to a court, other than bankruptcy, for relief, he may use a state court as well as a federal court. *Mondou vs. N. Y., New Haven & Hartford Ry. Co.*, 223 U. S. 1, 57, 56 L. Ed. 327, 32 S. Ct. 169. In *Steelman vs. All Continent Corporation*, 301 U. S. 278, 81 L. Ed. 1085, 57 S. Ct. 705, the trustee in bankruptcy was sustained in his resorting to a state court to have that court pass on the rights, if any, of the trustee in bankruptcy in certain assets. The superior jurisdiction made effective the seizure of the assets in question regardless of whether or not in the constructive possession of the state court.

Exclusive Jurisdiction.

Exclusive jurisdiction of the bankruptcy court, after the adjudication in bankruptcy, so far as the estate is concerned, covers only liquidation and administration. This jurisdiction may not be surrendered. *U. S. F. & G. vs. Bray*, 225 U. S. 205, 217, 56 L. Ed. 1055, 32 S. Ct. 620. *Concurrent Jurisdiction.* A bankruptcy court, after an adjudication, also exercises a concurrent jurisdiction, or as the court said in *Gamble vs. Daniel* (8 C. C. A.), 39 Fed. (2d) 447, 452, in speaking of the estate of the bankrupt, "in the collection

of such property there often arises questions as to the title of or rights and interest of the bankrupt in specific portions of that property. This necessitates determination by some court." The concurrent jurisdiction is used to make the certain portions of the estate above mentioned available for liquidation and administration under the exclusive jurisdiction. This concurrent jurisdiction may be surrendered. *Thompson vs. Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. Ed. 624, 60 S. Ct. 628. This concurrent jurisdiction is limited to determining questions of titles or rights and interests of the bankrupt, which are determined by conditions that existed at the date that the petition in bankruptcy was filed. Of necessity this is so because the line of cleavage is of that date. On that date creditors acquired a right *in rem* against the assets. *Sexton vs. Dreyfus, supra.* After that date the bankruptcy court cannot be deprived of its exclusive jurisdiction over the estate. *May vs. Henderson*, 268 U. S. 111, 69 L. Ed. 870, 45 S. Ct. 456. A bankruptcy court's concurrent jurisdiction is usually called "summary jurisdiction" because always exercised in a summary manner, or by a summary proceeding in the nature of a plenary action but never a plenary action. *Ex parte The City Bank of New Orleans*, 3 How. 292, 312, 11 L. Ed. 603. *Whitney vs. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778. Summary jurisdiction, except by consent, can only be exercised where the bankrupt was in possession actually or constructively of the specific portion of the estate when bankruptcy supervened. The importance of possession is discussed in *Marshall vs. Knox*, 16 Wall. 551, 556, 557, 21 L. Ed. 481. The bankruptcy court's summary jurisdiction must not be confused with its actual or constructive reach or seizure. While the bankruptcy court, except with the consent of the adverse claimant, cannot exercise its summary jurisdiction, unless

the bankrupt was in possession of the specific portion of the estate in issue actually or constructively, at the time the petition in bankruptcy was filed; the bankruptcy court's constructive reach or seizure does not depend upon possession, as we have already pointed out. Concurrent or summary jurisdiction never passes title nor does it determine what court will liquidate and administer the estate. It only determines what title, right or interest, if any, the bankrupt had in specific property, in issue, at the time the petition in bankruptcy was filed. The only effect of a lack of summary jurisdiction is that the trustee must go into a state or federal court, as the case may be, to have his rights determined. The exclusive jurisdiction of the bankruptcy court will liquidate and administer the assets in issue.

Jurisdiction Confused.

The Circuit Court of Appeals has confused the concurrent, or summary, jurisdiction of the bankruptcy court, with its exclusive jurisdiction. What the bankruptcy court was attempting to do in *Marcell vs. Engebretson,* 74 Fed. (2d) 93, was to determine the title of or rights and interest of the bankrupt in the assets in question based on the conditions existing when bankruptcy supervened. That is, to make such specific portion of the estate available for liquidation and administration under the court's exclusive jurisdiction. That was an exercise of a concurrent or summary jurisdiction. Both the right to exercise that jurisdiction, as well as the title of or rights and interest to be determined, were limited to conditions existing when bankruptcy supervened. Since the rights to be determined were based on conditions existing when bankruptcy supervened, no question of exclusive jurisdiction was involved, because only supervening

bankruptcy would put in motion the latter jurisdiction. The bankruptcy law determined what court would liquidate and administer the estate of the bankrupt. However, the Circuit Court of Appeals, because of confusing the two jurisdictions, now holds that the exclusive jurisdiction, or the jurisdiction to liquidate and administer, was determined. While the bankruptcy court could not surrender its exclusive jurisdiction, the effect of the holding of the Circuit Court of Appeals, if sustained, will amount to such a surrender. As petitioner said in his petition herein, all the Circuit Court of Appeals did or could determine in *Marcell, et al., vs. Engebretson, supra,* was that the lower court was without summary jurisdiction. This concurrent jurisdiction could have been surrendered. In view of the fact the assets in question were part of the bankrupt estate, the effect of the judgment in *Marcell vs. Engebretson* was to surrender the concurrent jurisdiction in favor of a plenary action. An action for possession of the assets in question would be unavailing as the records show most of such assets have been dissipated. The judgment in *Marcell vs. Engebretson, supra,* did not and does not constitute *res judicata* of any material issue in the cases at bar. The cases at bar are plenary actions and do not interfere with any possession the state court has if it has any. *Buck vs. Colbath,* 3 Wall. 334, 18 L. Ed. 257.

RESPONDENTS' POINT II

RESPONDENTS HAVE A MISCONCEPTION OF THE CASES THEY CITE. NONE OF THE CASES CITED BY RESPONDENTS SUPPORT THE HOLDING OF THE CIRCUIT COURT OF APPEALS IN THE CASES AT BAR. NEITHER DOES THE FOUR-MONTH RULE HAVE ANY APPLICATION TO THE CASES AT BAR.

Misconception Cases Cited.

Palmer vs. Texas, 212 U. S. 118, was a case of two courts exercising a concurrent jurisdiction. The federal court was not without jurisdiction as a federal court. *Lion Bonding & Surety Co. vs. Karatz*, 262 U. S. 640, 642, 67 L. Ed. 1151, 43 S. Ct. 641. Both suits were alike in purpose. *Harkin vs. Brundage*, 276 U. S. 36, 44, 72 L. Ed. 457, 48 S. Ct. 268. The question was which of two courts had the better right to liquidate the assets. In other words, the federal court could and did relinquish its concurrent jurisdiction. If in the cases at bar, it were true that the bankruptcy court might relinquish to the state court its jurisdiction to administer the property of the bankrupt estate, it would not be justified in doing so. The bankruptcy court is the only court in which those lawfully interested in the bankrupt estate can be protected. The district court in its findings of fact (R_2. 62) finds that the greater portion of the assets that West turned over to the Nebraska trustees has already been dissipated, if that court's jurisdiction is sustained. $18,425.00 of that sum has gone to Brome, McGuire, Herdman, Cherry & Braithwaite, attorneys for the Nebraska trustees. $23,700.00 has gone to Foster, Moriarity, Marcell, Byrne & Wear, past and present Nebraska trustees. $2,500.00 has gone to David A. Fitch, the attorney for and the law partner of

West, and evidently the state court will allow the balance of $4,000.00 claimed by Fitch, if its jurisdiction is sustained (R. 178-180). $2,500.00 has gone to Mulfinger & Webb, attorneys for Close, *et al.*, in the case in which West was wrongfully appointed receiver (280 Fed. 297). We submit, it is fair to assume, that if the State Court is permitted to administer the assets of the bankrupt estate, that no part of the same will reach any creditor.

Pickens vs. Roy, 187 U. S. 177, and *Frazier, et al., vs. Southern Loan & Trust Co.,* 99 Fed. 707, were actions by judgment creditors to remove obstructions to the enforcement of judgments caused by fraudulent conveyances. They were very similar in effect to levying of executions on the property of the debtor. The suits were to enforce liens upon property fraudulently conveyed. These actions were not for the benefit of creditors at large. The distribution by the State Court in the quo warranto action, in theory, is for the benefit of creditors at large. It purports to distribute the assets of the bankrupt estate to creditors in a manner similar to that of the bankruptcy court.

Relative to *Brictson vs. Close,* 25 Fed. (2d) 794, 800, that was a case to determine whether West would turn the corporate assets in his possession to the Nebraska trustees or the corporation (R. 112, 113). It was decided before supervening bankruptcy and cannot be conclusive of the issues in the cases at bar arising out of the effect of supervening bankruptcy. *Pepper vs. Litton,* 308 U. S. 295, 302, 84 L. Ed. 160, 60 S. Ct. 238.

While the Circuit Court of Appeals did not in its opinion, in the cases at bar, rely on the Four-Month Rule in bankruptcy, respondents do urge this rule, as applying to the cases at bar. The Four-Month Rule has no application to the quo warranto action, the appointment of the Nebraska

trustees, or the possession of the assets of the bankrupt estate in the actual possession of West when bankruptcy supervened. First, the quo warranto law and the quo warranto proceeding thereunder conflict with the National Bankruptcy Law, in so far as distribution of the bankrupt's assets to creditors may be concerned, and are superseded by the bankruptcy proceeding. *In re Weedman Stave Co.* (D. C.), 199 Fed. 948, where the state law was superseded by the National Bankruptcy Law, the state court receiver was in actual possession of the corporate assets for more than four months before bankruptcy. However, he was required to give way to the bankruptcy trustee. Second, the Four-Month Rule affects only creditors at large and applies only to relief under Sections 3, 60 and 67 of the National Bankruptcy Act. None of these sections are applicable to the quo warranto action.

The Four Month Rule in Bankruptcy Is One of Limitation Affecting Only Creditors at Large.

The FOUR MONTH RULE is a rule of RELATION BACK and not one of repose directed against the paramount *rem* character of the National Bankruptcy Act. THE CONDUCT OF THE DEBTOR AND NOT A STATE LAW PUTS IT IN MOTION. The FOUR MONTH RULE is a modification of the English RULE OF RELATION BACK. The FOUR MONTH RULE like the RULE OF RELATION BACK is for the benefit only of creditors at large, since they are the only creditors who can take advantage of the National Bankruptcy Act.

The RULE OF RELATION BACK was very familiar under the English law at the time of the adoption of the United States Constitution. Under the English law at that time

the line of cleavage was at the date of the First Act of Bankruptcy and not at the time of the filing of the petition as it is under our law. An act of bankruptcy under the English law fixed the status of the debtor to be that of a bankrupt without an adjudication. "Once a bankrupt always a bankrupt under the old English law," 2 Blackstone, 3rd Ed. (1768) 485. The RULE OF RELATION BACK dates from 1570 (13 Eliz. c. 7, Sec. 2 (12)). The RULE OF RELATION BACK was first passed on in *Smith vs. Mills* (1584), 1 Coke's Reports 481, 506, where the court in effect holds that the bankrupt is to be considered civilly dead so far as his property is concerned. In *Collet vs. Degols* (1734), Talbott's Cases 65, it was contended that advantage might be taken of an act of bankruptcy although forty years had elapsed after it was committed. In *Cooper vs. Chitty* (1756), 1 Burrows' Reports 20, 32, the court, in part, said:

> "This relation * * * was introduced to avoid frauds. They vest in the assignee all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes considered him as a criminal); they make the sale by the commissioner good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy and against all executions not served and executed before the bankruptcy act."

To the same effect is *Shawhan vs. Wherritt,* 7 How. 627, 644, 12 L. Ed. 847, 854.

Since the date of the commission of an act of bankruptcy, although it might be secret, was the date of the line of cleavage, and thereafter the debtor was considered civilly dead, the law worked a hardship on those dealing with the debtor without knowledge of such act of bankruptcy. The RULE OF RELATION BACK because of its harsh effect was modified by changes in the English law as follows: First, in the

case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. I, c. 15) (1604); second, in the case of the sale of real property by the bankrupt where the commission was not sued out within five years after the secret act of bankruptcy (21 Jac. I, c. 19) (1623); third, in the case of payments by the bankrupt to creditors for goods sold (19 Geo. II, c. 32) (1746); fourth, in the case of conveyances, contract, and other dealings and transactions with a bankrupt, *bona fide* made and entered into more than two calendar months before the date of the issuing of the commission (46 Geo. III, c. 65) (1806).

Howard vs. Crompton, 14 Blatchf. 328, Fed. Cas. 6758.

While the FOUR MONTH RULE is still a RULE OF RELATION BACK, much of the hardship of the rule under the English law has been avoided. The FOUR MONTH RULE relates back for a period of four months to enable creditors to take advantage of the act of bankruptcy and fix the status of the debtor to be a bankrupt. It also relates back four months from the time of the filing of the petition in bankruptcy to undo the conduct of the debtor that is condemned by Sections 60 and 67 of the Bankruptcy Law. The line of cleavage under the FOUR MONTH RULE is the time of the filing of the petition in bankruptcy and not the time of the commission of the FIRST Act of Bankruptcy.

The FOUR MONTH RULE is a limitation where time is of the essence of the right created. The rights created are covered by Sections 3, 60 and 67 of the National Bankruptcy Act. The FOUR MONTH RULE does not apply to any other sections of the Bankruptcy Law.

The rights created are, because of certain acts of the debtor, which creditors at large could not defeat except for the bankruptcy law, to enable the creditors at large within

four months of such acts to:

First. Have the debtor adjudicated a bankrupt and defeat the debtor's fraudulent acts that are condemned by the bankruptcy law. That is, by virtue of Section 3, have the status of the debtor and his estate fixed to be that of a bankrupt, amounting to civil death (*Int. Bank vs. Sherman,* 101 U. S. 403, 25 L. Ed. 866), with its attending consequences, including, by virtue of Sections 60 and 67, the undoing of the debtor's fraudulent acts for the benefit of the creditors at large; or,

Second. If the debtor resorts to bankruptcy, upon which there is no time limitation, the rights created enable the creditors at large, through their representative, the trustee in bankruptcy, to undo, by virtue of Sections 60 and 67, the fraudulent acts of the debtor, that are condemned by the bankruptcy law, committed within four months of supervening bankruptcy, and have the debtor's estate liquidated by the bankruptcy court for the benefit of the creditors at large as though the debtor was dead.

The acts of bankruptcy are of two kinds: First, and this is true of every bankruptcy act, have the status of the debtor fixed to be that of a bankrupt (civilly dead); and second, under those acts dealing with the debtor's disposition of his property also defeat the fraudulent conduct of the debtor. Under the first English bankruptcy laws the acts of bankruptcy were of the first kind. Under the present law, the acts of bankruptcy are mostly of the second kind.

The fraudulent acts of the debtor that are condemned by the bankruptcy law are acts of bankruptcy only if bankbankruptcy supervenes inside of four months from the time the act or acts take place. The present acts of bankruptcy are still the acts of the fraudulent trader. *American Surety*

Co. vs. Moretta, 287 U. S. 513, 518, 77 L. Ed. 466, 53 S. Ct. 260, 262.

Involuntary bankruptcy is still a trader's bankruptcy, based on fraud on creditors at large. Every voluntary bankruptcy is still a trader's bankruptcy, so far as recovery of assets by virtue of the provision of the Bankruptcy Law (Sections 60 and 67), rather than a state law, are concerned. Outside of Sections 60 and 67, which cover debtor's conduct within the four months, all recoveries occasioned by the conduct of the debtor, are by virtue of the state law. The FOUR MONTH RULE does not apply to recoveries under state law. *Carlson vs. Kirchman,* 131 Nebr. 229, 267 N. W. 452. Every one of the acts of bankruptcy are based on the conduct of the debtor as an examination of the same will show.

The first act of bankruptcy is the well-known common-law fraudulent conveyance, which has been an act of bankruptcy since 1604 (1 Jac. I, c. 15). The fraudulent conveyance condemned by this act of bankruptcy is defeated by the trustee in bankruptcy, the representative of creditors at large, by virtue of Section 67 of the Bankruptcy Act, which originated in 1623 (21 Jac. I, c. 19), and quoted hereinafter.

The second act of bankruptcy, a preferential transfer, has been called a conventional fraud. 2 *Collier on Bankruptcy,* 13th Ed., p. 1243. It has been an act of bankruptcy since *Worseley vs. Demattos* (1758), 1 Burrows' Reports 467. A preference was not statutory in England until 1869 and in the United States until 1841. 2 *Collier on Bankruptcy,* 13th Ed., p. 1244. A preferential transfer is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 60 of the Bankruptcy Act. This section condemns: first, transfers within four months before the petition in bankruptcy is filed; and second, transfers made after the petition filed. The first character of transfer has been

recoverable since *Alderson vs. Temple* (1768), 4 Burrows' Reports, p. 2235. The second character of transfer has been recoverable since *Smith vs. Mills* (1584), 1 Coke's Reports 481.

The Third and Fourth Acts of Bankruptcy, a preference through legal proceedings was condemned by law first in 1623 (21 Jac. I, c. 19), in the following language:

> "And for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt to and among his or her creditors; (2) be it enacted, that the commissioners or the greater part of them shall and may upon oath or by any other way or means as to them shall seem meet, any person or persons for the finding out and discovery of the truth and certainty of the several debts due and owing to all such creditor and creditors as shall seek relief by such course of commission to be sued forth as aforesaid; (3) and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, where there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, or recognizance, specialty, attachment or other security for any more than a ratable part of their just and due debts, with the other creditors of said bankrupt, without respect to any such penalty, or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security."

Time as a limitation in connection with an act of bankruptcy is not new. It was an act of bankruptcy under the Roman law before England had a bankruptcy law, to leave a judgment unsatisfied for thirty days. The preferential transfer through legal proceedings (the Third Act of Bankruptcy) is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 60 of the Bankruptcy Act, if such proceedings has resulted in the sale of the property. If the legal proceedings has resulted in only a lien (the Fourth Act of Bankruptcy) it is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 67 of the Bankruptcy Act.

The Fifth Act of Bankruptcy consists in the debtor making a general assignment for benefit of creditors, or while the debtor is insolvent a receiver or trustee is put in charge of his property.

The general assignment for the benefit of creditors was condemned by the English courts because it would rescind the whole system of the bankrupt laws, and instead of applying to the Great Seal, the debtor would choose his own trustee. *Alderson vs. Temple* (1768), 4 Burrows' Reports 2235. Also for the further reason that the debtor could no longer trade and, therefore, no longer pay his debts as a trader. In *Devon vs. Watts* (1779), 1 Douglas' Reports 86, 92, the court in this connection said:

> "It has been settled, over and over, that if a trader makes a conveyance of all of his property, that is, instantly, an Act of Bankruptcy. It is fraudulent. It destroys the capacity of trading. * * * It was a fraud in Jackson to deal with any one as a trader."

The general assignment for benefit of creditors, the exercising of the debtor's right to contract with respect to his

property, is defeated by the trustee in bankruptcy, representing the creditors at large, acting under Section 67.

Randolph vs. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 23 S. Ct. 710.

Putting a receiver or trustee in charge of the debtor's property while he is insolvent prevents the debtor from longer trading or paying his debts as a trader. This act of bankruptcy enables the creditors at large to have the status of the debtor fixed to be that of a bankrupt. That is the only purpose of this act of bankruptcy. This act of bankruptcy does not fall within the condemnation of Sections 60 or 67. This is an act of bankruptcy, if bankruptcy supervenes inside of four months, since it is by operation of law. It is superseded by bankruptcy at any time before it is completed. This results from the paramount character of the National Bankruptcy Act.

The Fifth Act of Bankruptcy consists of the debtor admitting in writing his inability to pay his debts and his willingness to be adjudicated a bankrupt. This is a well known act of bankruptcy (debtor's failure to pay or cessation of payment) expressed in different language and eliminating any necessity for a time element in connection with a failure to pay, to make it an act of bankruptcy.

The Roman law in force before England had a bankruptcy law, made it an act of bankruptcy: to leave a judgment unsatisfied for thirty days; and to admit without discharging a debt and taking no steps to pay it. The Eleventh Act of Bankruptcy under the statute of 4 Geo. III, c. 33, read:

> "Neglect to make satisfaction for any just debt to the amount of 100 pounds within two months after service of legal process for such debt upon any trader having privilege of Parliament."

The Eighth Act of Bankruptcy in our law of 1867 provided:

> "Eighth, who, being the banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment or who has stopped and suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt."

Wherefore, petitioner submits that nothing that was or could be decided in *Marcell vs. Engebretson, supra,* constitutes *res judicata* of any issue in the case at bar.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JUL 29 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 161

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT,
Petitioner,

vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION,
Respondents.

No. 162

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT,
Petitioner,

vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,
Respondents.

BRIEF OF RESPONDENTS FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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A judgment rendered by a State Court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be rebuked or reexamined as to the merits of the original controversy. It will be conclusive as to all points and questions actually put in issue and decided in the action in the State Court, whether federal, general or local.

Point II 12-13

Proceedings in a State Court, which resulted in appointment of trustees to take over the property of corporation for liquidation and distribution prior to four months' period preceding filing of involuntary bankruptcy petition, withdrew property of corporation from jurisdiction of bankruptcy court and subsequent bankruptcy proceedings, though State Court trustees had not come into possession of property.

Point III 13-14

Judgments entered in *Brictson Manufacturing Company v. Close, et al,* 25 Fed. (2d) 794 *Marcell vs. Engebretson,* 74 Fed. (2d) 93, 76 Fed. (2d) 876, and *Engebretson v. Marcell, et al,* 84 Fed. (2d) 315, are res judicata between the parties thereto and their privies and the Trustee in Bankruptcy is estopped to assert a claim for damages against the Surety of the State Trustees based upon wrongful conversion of the property taken over by the State Trustees in their official capacity.

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In the
Supreme Court of the United States

OCTOBER TERM, 1939

No.....

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT,
Petitioner,

vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION,
Respondents.

No.....

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT,
Petitioner,

vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,
Respondents.

BRIEF OF RESPONDENTS FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition for a writ of certiorari seeks to review judgments of the Circuit Court of Appeals for the Eighth Circuit, affirming decisions of the United States District Court, for the District of South Dakota, Southern Division.

The two cases presented involve the same state of facts, and in the interest of brevity, respondents in the two actions have joined in one brief in opposition to the petition for the writ.

The two actions were consolidated for trial before the trial court. Separate appeals were perfected. The record in the first case numbered 11,590 in the Circuit Court of Appeals contains the evidence. Reference in this brief to the record in the first case will be referred to as "R" and to the record in the second case as "R 2."

The questions presented are:

(1) Whether the judgments of the Circuit Court of Appeals entered in the case of *Marcell, et al, vs. Engebretson,* 74 F. (2d) 93 and in the case of *Engebretson vs. Marcell, et al,* 84 F. (2d) 315, or either of them, constituted res judicata of the issues presented in the case at bar.

(2) Whether the judgment of the Supreme Court of the State of Nebraska in the quo warranto action entitled *State ex rel Spillman vs. Brictson Manufacturing Company,* 114 Neb. 341; 207 N. W. 664, was superseded by the National Bankruptcy Act under bankruptcy proceedings subsequently instituted agaist the Brictson Manufacturing Compapny.

(3) Whether Ralph M. West, appointed by the United States District Court for the District of Nebraska, Omaha Division, was justified in turning over the assets of the Brictson Manufacturing Company, then in his possession as Receiver, upon order of that court to the Trustees appointed by the Nebraska Supreme Court after supervening bankruptcy in the United States Dis-

trict Court for the District of South Dakota, Southern Division.

(4) Whether the order of the State Court in the quo warranto action refusing to direct the Nebraska Trustees to deliver the assets of the Brictson Manufacturing Company, then in their possession, to the Trustee in Bankruptcy constituted res judicata of the issue of whether the Nebraska Trustees breached their bond as Trustees by taking possession of the assets of the Brictson Manufacturing Company after the company had been adjudicated a bankrupt in the South Dakota Court.

STATEMENT OF FACTS

The proceedings, so far as here relevant, are briefly summarized as follows:

August 2, 1921. Bill of complaint was filed in the United States District Court, for the District of Nebraska, Omaha Division, by stockholders, against the Brictson Manufacturing Company, a South Dakota corporation, then doing business in Nebraska, praying among other things, for the appointment of a receiver (R. 95-103).

September 3, 1921. That Court appointed Ralph M. West of Omaha, Nebraska, receiver, and under this appointment the receiver took possession of the property and assets of the defendant company, including the property involved in this proceeding (R. 24).

April 5, 1922. The United States Circuit Court of Appeals for the Eighth Circuit, entered a judgment reversing the order appointing the receiver (Brictson vs. Close, 280 Fed. 297).

March 13, 1923. The Attorney General of the State of Nebraska commenced an action in the District Court

of Douglas County, Nebraska, in the nature of a quo warranto proceeding (R. 129-143).

The corporation appeared in the action (R. 143).

February 16, 1924. After hearing, a decree was entered in that Court, finding generally for the plaintiff and against the defendant, ousting the corporation from the State of Nebraska and appointing John F. Moriarty, Charles E. Foster and John T. Marcell, trustees, and directing the trustees so appointed to collect the debts, property and assets of the corporation in the State of Nebraska, to pay the liabilities of the corporation and divide the surplus, if any, among those lawfully entitled thereto (R. 154-158). The quo warranto proceedings were instituted pursuant to the provisions of Chapter 20, Article 21 Sub-division (h), Secs. 20-21,112 to 20-21,133, inclusive, Compiled Statutes of Nebraska, 1929.

November 24, 1925. The corporation filed a petition in the original proceeding in the United States District Court, for the District of Nebraska, Omaha Division (Close vs. Brictson Mfg. Co.) for an order to show cause, directed to the Attorney General of the State of Nebraska and the trustees appointed by the District Court of Douglas County, requiring them to show cause why the receiver (West) should not comply with the mandate theretofore issued by the Circuit Court of Appeals and return the property then in his hands to those from whom he had received it (Brictson Mfg. Co. vs. Close, et al, 25 F. (2d) 794). Ora S. Spillman, as Attorney General, of the State of Nebraska and the Trustees to whom the order was directed filed answers to the orders to show cause (R. 112-114).

March 25, 1926. The Supreme Court of the State of Nebraska, on hearing upon appeal prosecuted by the corporation to that Court, issued its mandate to the District Court of Douglas County, Nebraska, affirming the judgment of ouster of the corporation, modifying the judgment of the lower court so as to require the trustees to collect the debts due the corporation, pay the liabilities of the corporation and when properly ordered, to pay out the surplus, if any, to those lawfully entitled thereto, as provided by Section 9298, Compiled Statutes of Nebraska for 1922, and as thus modified the judgment of the District Court of Douglas County, Nebraska, to stand affirmed (R. 159-160) (Opinions reported in State vs. Brietson Manufacturing Co., 205 N. W. 246 and 207 N. W. 664).

November 3, 1926. After hearing upon the issues joined, Honorable Thomas C. Munger, Judge of the United States District Court for the District of Nebraska, entered a decree ordering and directing the receiver to turn the property involved in this proceeding over to the trustees appointed by the Nebraska Court, said order to be held in abeyance, however, with respect to an aggregate sum of $50,000.00 pending a final determination of the rights of one Frank L. Weaver, William N. Giller and M. E. Culhane, then pending in the United States Circuit Court of Appeals, on appeal from an order of the court made June 30, 1925, and further providing that in event an appeal should be taken by any of the parties that the receiver make none of the payments nor surrender any of the property without a further order of the Court (Brietson Mfg. Co. vs. Close, et al, 25 F. (2d) 794).

January 31, 1927. The appeal to determine the rights of Frank L. Weaver, William N. Giller and M. E. Culhane, which was an action to impress a lien upon the funds then in the hands of the receiver, for services rendered, was determined adversely to the appellants (Culhane, et al, vs. Anderson, et al, 17 Fed. (2d) 559).

April 2, 1928. Upon an appeal perfected by the corporation from the decree of the United States District Court, entered upon the 3rd day of November, 1926, the United States Circuit Court of Appeals for the Eighth Circuit, affirmed the decree directing the receiver West to turn the property involved in this proceeding over to the trustees appointed by the Nebraska Court (Brictson Mfg. Co. vs. Close, et al, 25 Fed. (2d) 794).

June 24, 1929. Order was entered by Judge Munger in that proceeding, directing the receiver, after making certain specific payments, to deliver all of the remainder of the money, funds, credits and property, real, personal and mixed, to the State trustees (R. 2, 41-43).

August 3, 1929. Petition in bankruptcy filed against the Brictson Manufacturing Company in the District Court of South Dakota, Southern Division, and on August 21, 1929, the Brictson Manufacturing Company was adjudicated a bankrupt, the petitioner herein, Martin Engebretson, being appointed trustee in bankruptcy in said proceeding (alleged in complaint R. 2, 19; admitted by answer R. 2, 33).

September 9, 1929. No supersedeas having been filed, the receiver did, on that date, comply with the order entered by United States District Court for District

of Nebraska, entered June 24, 1929, and turned over to the trustees appointed by the State Court, certain property, being the property involved in this proceeding (R. 188).

January 30, 1933. Petitioner Engebretson, as trustee in bankruptcy, upon a petition filed by him in the bankruptcy proceeding pending in South Dakota, procured an order to show cause, directed to the trustees appointed by the Nebraska Court, requiring them to appear before that Court to show cause why it should not be decreed that they had no right, title and interest in and to the assets of the Brietson Manufacturing Company, or any part thereof, or why they should not be ordered and directed to turn over to the petitioner all assets that they might have received after the filing of the petition in bankruptcy and be restrained and enjoined from in any manner interfering with the property of the bankrupt estate or with the trustee in bankruptcy in the administration of said estate.

The Nebraska trustees appeared specially, objected to the jurisdiction of the court over their persons, and asserted that, being adverse claimants, the court of bankruptcy was without power, in a summary proceeding, to determine the question of title or right to possession of the property in question, without their consent. The court of bankruptcy overruled the special appearance and entered an order adjudging that the trustee in bankruptcy was the owner and entitled to the possession of the property, and authorizing him to take all necessary and proper measures to secure its possession. An appeal was perfected to the Circuit Court of Appeals for the Eighth Circuit,

and that Court on November 22, 1934, filed its opinion in the appellate proceedings, holding the court below was without jurisdiction to adjudicate title to the property in the hands of the trustees appointed by the State Court, reversed the order, and remanded the case with directions to grant a dismissal (Marcell vs. Engebretson, 74 Fed. (2d) 93).

A rehearing was granted, the case reargued before the Circuit Court of Appeals, and on April 15, 1935, the court filed its opinion adhering to its former decision (Marcell vs. Engebretson, 76 Fed. (2d) 876). The trustee in bankruptcy filed a petition for a writ of certiorari in the Supreme Court of the United States to review the opinion and judgment of the Circuit Court of Appeals. This petition was denied by this Court on the 14th day of October, 1935 (Engebretson, Trustee, Petitioner, vs. Marcell, et al, 56 Supreme Court Rep. 89).

Thereafter, the trustee in bankruptcy brought a plenary action in the United States District Court for the District of Nebraska in the nature of a suit in equity, praying for a decree requiring the Nebraska trustees to account for and turn over to the trustee in bankruptcy all of the property formerly belonging to the Brictson Manufacturing Company which had come into their hands, this being the property involved in the present suit. The trustees filed a motion to dismiss on the ground that the Federal Court was without jurisdiction over the subject matter. The motion was sustained and an order entered dismissing the complaint. The trustee prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, and on June 12, 1936, that Court filed its opinion

affirming the order of the United States District Court for the District of Nebraska, again holding that the Nebraska State Court in the quo warranto proceedings had acquired jurisdiction to administer the assets free from interference from the other courts, including the court of bankruptcy (Engebretson vs. Marcell, et al, 84 Fed. (2d) 315).

The trustee in bankruptcy filed a petition for writ of certiorari in this Court to review the opinion and judgment entered by the Circuit Court of Appeals. The petition was denied by this Court on the 12th day of October, 1936. (Engebretson, Trustee, Petitioner, vs. Marcell, et al, 299 U. S. 566).

Petition for rehearing was denied November 9, 1936 (Engebretson, Trustee, Petitioner, vs. Marcell, et al, 299 U. S. 621).

On the 25th day of July, 1938, the trustee in bankruptcy filed an action in the Circuit Court of the State of South Dakota, for the Second Judicial District against John T. Marcell, Harry S. Byrne and Fidelity & Deposit Company of Maryland, a corporation, alleging that the defendants Marcell and Byrne, as trustees appointed by the Nebraska State Court, had wrongfully converted property of the Brietson Manufacturing Company and that the defendant Fidelity & Deposit Company of Maryland was liable to the plaintiff by virtue of a faithful performance bond executed on behalf of the said Marcell and Byrne as trustees appointed by the State Court of Nebraska. The prayer of the petition was for a money judgment against Marcell and Byrne in the sum of $78,398.88 and for a judgment against Fidelity & Deposit Company of Maryland as bondsman in the sum of $50,000.00, this

being the face amount of the bond (R. 2, 17-22). A similar action was filed against Ralph M. West and the Aetna Casualty and Surety Company (R. 19-23).

No service having been made upon defendants Marcell, Byrne or West within the jurisdiction of the South Dakota Court, they filed special appearances, challenging the jurisdiction of the Court over their person, and petitions for removal to the United States District Court for the District of South Dakota, Southern Division (R. 2, 9-11) (R. 2, 10-14).

The defendants Fidelity Deposit Company of Maryland and the Aetna Casualty and Surety Company filed separate petitions for removal to the Federal Court (R. 2, 12, 13) (R. 5-7).

Removal orders were entered by the State Court (R. 2, page 3) (R. 1-2).

Orders sustaining the special appearances and granting the motion to quash service on the defendants Marcell, Byrne and West were entered by the Honorable A. Lee Wyman, Judge of the United States District Court for the District of South Dakota, Southern Division (R. 2, 44, 45) (R. 50).

A jury was waived and the causes consolidated for trial (R. 2, 55). The cases as consolidated were tried before the Honorable A. Lee Wyman, Judge of the United States District Court for the District of South Dakota.

On the 17th day of April, 1939, that Court filed findings of fact and conclusions of law finding that the Nebraska State Court trustees were rightfully entitled to the possession of the property at the time it was turned

over to them by West as receiver, and that the plaintiff, as trustee in bankruptcy of the Brictson Manufacturing Company, was not the owner thereof and was not entitled to the possession thereof, either at said time or at any other time, and that the property was not a part of the bankrupt estate. The Court further found that there was no evidence that the Nebraska State Court trustees, or any of them, ever breached any of the terms of the bond, upon which the action is based, or that any of them converted or misapplied any of the property referred to in the action (R. 2, 60).

In its conclusions of law, the Court found that none of the State Court trustees misapplied or converted any of the property referred to in the plaintiff's complaint or breached any of the terms of the bond upon which the action was based; that the property did not become a part of the bankrupt estate, and the trustee in bankruptcy was not entitled to possession of it; that at the time the property was turned over to the Nebraska State Court trustees, they were the owners thereof and entitled to possession; that the decision of the United States Circuit Court of Appeals, reported in 25 Fed. (2d) 794, constitutes a final determination that the property, which the plaintiff alleges was converted, belonged to the Nebraska State Court trustees to be administered by them under its direction; that the decision of the United States Circuit Court of Appeals in the cases reported in 74 Fed (2d) 93, and 84 Fed. (2d) 315, respectively, are res judicata and binding upon the plaintiff in this action, and that those decisions finally determined that the plaintiff was not the owner of the property and not entitled to possession thereof; that the order of the Nebraska State Court in the quo

warranto proceedings on June 18, 1930, was a final order and is res judicata upon the question of the right of the plaintiff to possession of the property and bars the plaintiff a right of recovery in this action (R. 2, 63, 64).

Similar findings of fact and conclusions of law were filed in the action against West and the Aetna Casualty and Surety Company, a corporation (R. 60-67).

April 17, 1939. Pursuant to the findings of fact and conclusions of law, judgments were entered dismissing the plaintiff's complaints upon the merits (R. 2, 65 66) (R. 68).

POINTS AND AUTHORITIES

I.

A judgment rendered by a State Court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be reviewed or re-examined as to the merits of the original controversy. It will be conclusive as to all points and questions actually put in issue and decided in the action in the State Court, whether federal, general or local.

Mitchell v. First National Bank of Chicago, 180 U. S. 471, 481, 21 S. Ct. 418, 422.

Lion Bonding and Surety Company v. Karatz, 262 U. S. 77, 43 S. Ct. 480.

Brictson Manufacturing Company v. Close, 25 Fed. (2d) 794, 800.

Marcell, et al v. Engebretson, 74 Fed. (2d) 93, 95.

34 *C. J.*, 1158, Section 1640.

II.

Proceedings in a State Court, which resulted in appointment of trustees to take over property of corporation for liquidation and distribution prior to four months'

period preceding filing of involuntary bankruptcy petition, withdrew property of corporation from jurisdiction of bankruptcy court and subsequent bankruptcy proceedings, though State Court trustees had not come into possession of property.

Marcell v. Engebretson, 74 Fed. (2d) 93.

Palmer v. State of Texas, et al, 212 U. S. 118, 129, 29 S. Ct. 230, 233.

Pickens v. Roy, 187 U. S. 177, 23 S. Ct. 78.

Frazier, et al, v. Southern Loan and Trust Co., 99 Fed. 707.

Lion Bonding and Surety Company v. Karatz, 262 U. S. 77.

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III.

Judgments entered in Brictson Manufacturing Company v. Close, et al, 25 Fed. (2d) 794; Marcell vs. Engebretson, 74 Fed. (2d) 93, 76 Fed. (2) 876, and Engebretson v. Marcell, et al, 84 Fed. (2d) 315, are res judicata between the parties thereto and their privies and the Trustee in Bankruptcy is estopped to assert a claim for damages against the Surety of the State Trustees based upon wrongful conversion of the property taken over by the State Trustees in their official capacity.

Howe & Rogers Co. v. Crittenden, et al, 76 Fed. (2d) 749.

Columbia Fire Ins. Co. of New Jersey vs. Mart Waterman Co., Inc., 11 Fed. (2d) 216, 219.

Scholtz, Governor, for Use of Barnett National Bank, vs. Hartford Accident and Indemnity Co., 88 Fed. (2d) 184.

National Surety Corporation of New York vs. Ellison, 88 Fed. (2d) 399, 407.

Hartford Life Insurance Co. vs. Ibs, 237 U. S. 662.

City of Watertown vs. Eastern Dakota Electric Co., 296 Fed. 832, 834, 835.
Cromwell vs. Sac County, 94 U. S. 351.
Miller vs. Belvy Oil Co., 248 Fed. 83.
North American Union vs. Hart, 250 Fed. 390.
Rader vs. Star Mill, etc. Co., 258 Fed. 599.
Mitchell vs. First National Bank of Chicago, 180 U. S. 471.
Brictson Manufacturing Co. vs. Close, et al, 25 Fed. (2d) 794.

ARGUMENT

The Circuit Court of Appeals, for the reason stated in its opinion (R. 211-219) entered its judgment affirming the decisions of the District Court (R. 219, 220) (R. 2, 99-100).

The facts disclosed by the record, the issues raised thereby, and the law applicable thereto are fairly and fully set forth in the opinion. The merits of this controversy have actually been finally determined on five different occasions.

The Brictson Manufacturing Company, on November 24, 1925, nearly four years before bankruptcy intervened, raised the issue of the right of possession to the property involved in this proceeding. Under issues joined between the parties in the original proceeding pending in the United States District Court for the District of Nebraska, that Court held that under the proceedings instituted by the Attorney General in the State Court of Nebraska, the state trustees acquired jurisdiction of the property in Nebraska held by West as receiver, and were entitled to possession thereof. The Brictson Manufacturing Com-

pany appealed to the Circuit Court of Appeals for the Eighth Circuit, and that Court held that the judgment of the Supreme Court of the State of Nebraska in the ouster proceedings was a final adjudication and binding upon the corporation. In its opinion, the Court said:

> "In Mitchell v. First National Bank of Chicago, 180 U. S. 471, 481, 21 S. Ct. 418, 422 (45 L. Ed. 627) it is said:
>
> " 'Whatever may be the nature of a question presented for judicial determination—whether depending on federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.'
>
> "The Supreme Court of Nebraska in the quo warranto proceeding brought by the Attorney General on behalf of the state found that the District Court was justified in ousting the Brictson Manufacturing Company from doing business in Nebraska; found that the trustees were entitled to take charge of the property of said corporation within the state for the purpose of paying the creditors, and that the balance should be turned over to the parties whom the court might direct. It seems to us the federal court had no other alternative than to abide by the binding effect upon appellant of that unchallenged decision. * * * " (Brictson Mfg. Co. v. Close, 25 Fed. (2d) 794, 800.)

Thereafter the trustee in bankruptcy appeared in the quo warranto proceedings in the Nebraska State Court and made application for an order requiring the state trustees to turn over the property involved in this proceeding to the trustee in bankruptcy (R. 170, 171). This

application was overruled by the State Court (R. 2, 43, 44). No appeal was taken from this order (R. 190).

It is respondents' contention that this order is a final order involving the issues presented in this proceeding and is res judicata under the rule above set forth. The Circuit Court of Appeals for the Eighth Circuit was again called upon to pass upon this question in the case of *Marcell, et al vs. Engebretson,* 74 Fed. (2d) 93, 96. In that case the Appellate Court held that "at the time the involuntary petition in bankruptcy was filed, the corporation had neither the actual possession of its property in the State of Nebraska nor the right to such possession. * * * " The Court applied the rule announced by this Court that "when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession, and control of the property."

The trustee in bankruptcy filed a petition for writ of certiorari in this Court to review the opinion and judgment entered by the Appellate Court, and the petition was denied on the 14th day of October, 1935. *Engebretson, Trustee, Petitioner vs. Marcell, et al,* 56 Supreme Court Rep. 89.

At the conclusion of this litigation, the trustee in bankruptcy commenced a plenary action in the United States District Court for the District of Nebraska, asking for a decree requiring the trustees appointed by the

State Court of Nebraska to account for and turn over the identical property that is the basis of the present action. That Court sustained a motion to dismiss the plaintiff's petition for lack of jurisdiction. The trustee again prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, and again that Court was called upon to pass upon the right of possession to the property. In sustaining the trial court's order dismissing the case for lack of jurisdiction, the Court said:

> " * * * We have again reached the same conclusions to which we gave expression in the Marcell Case. It is, of course, clear that, if our decision in that case to the effect that the Nebraska state court in the quo warranto proceedings had acquired jurisdiction to administer the assets free from interference by other courts, including the court of bankruptcy, was correct, then this case is governed by that decision, and the court below had no other recourse than to dismiss the complaint." *Engebretson vs. Marcell,* 84 Fed. (2d) 315, 316.

The trustee in bankruptcy filed a peittion for a writ of certiorari in this Court to review the opinion and judgment of the Appellate Court. The petition was denied by this Court on the 12th day of October, 1936. *Engebretson, Trustee, Petitioner vs. Marcell, et al,* 299 U. S. 566.

It would extend this brief unnecessarily to recapitulate the reasons and citations supporting the decisions of the Circuit Court of Appeals for the Eighth Circuit above set forth since the citations are incorporated in the respective opinions.

———o———

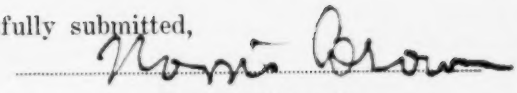
CONCLUSION

We submit that the decision of the Circuit Court of Appeals is consistent with the decisions of this Court and that it is clearly established on the record:

1. The trustee in bankruptcy did not acquire the right of possession to the property involved by virtue of the bankruptcy proceedings for the reason that title and right of possession to the property had passed into the jurisdiction of the State Court by virtue of the quo warranto proceedings which had finally been concluded more than four months prior to the filing of the petition in bankruptcy.

2. That the decision of the Supreme Court of the State of Nebraska in the quo warranto proceeding, the decision of the District Court of Douglas County, Nebraska, in the quo warranto proceedings denying the application of the trustee for a turn-over order of the property involved, from which no appeal was taken, and the three decisions of the United States Circuit Court of Appeals for the Eighth Circuit, all determining the right of the State Trustees to possession of the property, which the Trustee in Bankruptcy now claims was wrongfully converted, were each res judicata under the rule announced in *Mitchell v. First National Bank of Chicago,* 180 U. S. 471, 481, 21 S. Ct. 418, 422.

Respectfully submitted,



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